APPENDIX.

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 76-1040.

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for a Writ of Certiorari Filed January 29, 1977.

Certiorari Granted June 27, 1977.

In the
Supreme Court of the United States.

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[1] The indictment, the judgment of acquittal of the district court, and the opinion and judgment of the court of appeals are reproduced in the appendix to the petition for a writ of certiorari.

United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

UNITED STATES OF AMERICA

v.

THOMAS SANABRIA.

Relevant Docket Entries.

1972		
Sept. 12	Indictment returned.	
1975		
Nov. 18	SKINNER, J.	Criminal jury trial continues; Govt. rests; Defts.' requests for instructions filed; Hearing outside of jury on defts.' motion to strike testimony of Special Agent Raymond Ball, Motion DENIED; Deft. Silverman's Motion to strike Govt.'s exhibits #30-39 is DENIED; Deft. Silverman's motion to strike testimony of Special Agent James Kalstrom is DENIED; Motion of Joseph Glixman to strike is DENIED; Motions of each deft. for judgment of acquittal are Taken under Advisement; Deft., Silverman renews Motion to dismiss, Motion DENIED; Criminal jury trial resumes; Stipu-

1975

Nov. 18 — lation re: Testimony of Special agent Boyd (between Govt. and Silverman) filed; Deft. Julius Silverman rests; remaining defts. rest; jury excused; Motion of Deft. Sanabria for Judgment of acquittal is ALLOWED; Motions of all other defts. for Judgment of Acquittal are DENIED.

Nov. 18 SKINNER, J. — JUDGMENT OF ACQUITTAL RE DEFT SANABRIA, ENTERED. cc/cl

Nov. 19 SKINNER, J. — Appearance of Gerald E. McDowell for the Govt., filed. Govt.'s Motion for reconsideration of Court's ruling re: Deft., Sanabria filed; Govt.'s Motion to reconsider Court's ruling striking evidence of all illegal pari-mutual numbers pool filed; both motions for reconsideration are DENIED; Criminal Jury trial continues; Closing arguments by counsel; Luncheon recess; Charge; Alternate jurors discharged; Jury retires for deliberation at 2:27 P.M.; Jury returns at 4:45 P.M. with verdicts of Guilty as to all Defts.*; Verdict recorded and entered; Disposition on Dec. 10, 1975 at 2 P.M.

Dec. 18 — Govt's Notice of Appeal re deft Sanabria filed.

Dec. 29 — Designation of issue on Appeal filed re Sanabria filed.

Dec. 29 — Designation of record on Appeal re Sanabria filed.

United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

[Title omitted in printing.]

Excerpts from Transcript of Sixth Day of Trial.

[2] THE COURT: Good morning, ladies and gentlemen. Good morning, counsel.

All right, the Government has rested, as I understand it. Is that true, Mr. Jigger?

MR. JIGGER: Your Honor, we only have one matter to be handled at the side bar.

(Conference at the bench as follows:

MR. JIGGER: Your Honor, when I indicated —

THE COURT: Wait until everybody gets here.

MR. JIGGER: Your Honor, on Friday I indicated we had no further witnesses. Now I would ask the Court to take judicial notice of the Massachusetts State Statute, a copy of which I provided, in Section 17 that is charged in the indictment. Also, at this time I have given counsel a copy of a further request for instructions the Government is filing in its case.

THE COURT: Do the Defendants intend to request instructions?

MR. DIMENTO: Yes, sir, I have some.

THE COURT: This is about the time to file them.

[3] MR. DIMENTO: All right.

THE COURT: Do you intend to go forward with testimony this morning?

MR. REDMOND: I thought first we would have some Motions to Strike, and then Motions for Judgment of Acquittal, and then put on my defense. Is that the order?

THE COURT: Yes. We better send the jury back up, then.

MR. REDMOND: Fine.

THE COURT: I'll take judicial notice of the statute. All right, we'll hear the motions and the Motions to Strike.

. . . . . .

[20] THE COURT: What other motions? Everybody has a Motion for Judgment of Acquittal?

MR. ALBERINO: Yes.

MR. GOLDBERG: Yes.

THE COURT: I don't think there is any question that there is sufficient evidence to go to the jury. Do you seriously want to argue that now?

MR. DIMENTO: I do, your Honor, yes.

THE COURT: Go ahead.

MR. DIMENTO: My Motion for Judgment of Acquittal on behalf of my clients, your Honor, is based principally on the failure of the Government [21] to prove that there was a violation of the State law as alleged in the indictment.

THE COURT: All right. In what respect?

MR. DIMENTO: The indictment states that these people were in a gambling business of registering bets on a number pool and on horse races. It says beasts, but we'll use the shortened expression, horse races, and that that was a violation of Section 17, which is in evidence. It was just put in evidence this morning.

THE COURT: Yes.

MR. DIMENTO: Your Honor has had long experience with our State law and especially — not especially, but including Section 17.

THE COURT: Not until I got here, as a matter of fact.

MR. DIMENTO: Really?

THE COURT: Yes.

MR. DIMENTO: Well, the case of Commonwealth versus Chagnon is very well known under Section 17. That is C-h-a-g-n-o-n, reported at 330 Massachusetts Reports, Page 278.

At page 282 the Court says that registering bets as such is not made a crime by Section 17. The allegation in that case was that the Defendants had [22] conspired together to commit the crime of registering bets. You have much of that here, that the Defendants here engaged in the illegal gambling business of registering bets in violation of 17. In other words, the allegations are parallel, and the Supreme Judicial Court of Massachusetts, which is the last authority for construing our Massachusetts laws, states quite clearly that registering bets as such is not a crime, so that the Defendants have not been proved in this case to have violated Massachusetts law Chapter 271, Section 17, as alleged.

Now, furthermore, your Honor —

THE COURT: Excuse me, Miss Cleeman, get me 330 Mass., please.

MR. DIMENTO: Furthermore, this indictment charges that the Defendant engaged in the illegal business of accepting bets on a parimutual number pool in violation of 17, and I think your Honor's experience with Massachusetts law will tell him that there is no violation of Section 17 in engaging in the number pool business, because Section 17 is designed to reach apparatus which is designed for use in races, horse races, sports betting, games, and so forth. It is

not designed to reach a pool which is not based on a game of competition. [23] Your Honor knows that this is not the statute that is used to prosecute number pool violators.

I believe the statute that is used for that is Section 7. At any rate, it is not this statute. This statute is very narrowly drawn, making it a crime to be in the presence of gambling apparatus, which is used for wagers in connection with contests, games, competitions, whether man or beast. So that I take the position, your Honor, and I submit very strongly that they have not proved what they have alleged and specified in the indictment.

THE COURT: All right.

MR. DIMENTO: The top of Page 282, your Honor, the first full sentence, about registering bets?

THE COURT: Yes.

MR. DIMENTO: The indictment is set out in the footnote at the bottom of Page 278.

THE COURT: I think there is a difference, when you start with 1955, but I'm going to explore that in just a minute. Are there any other grounds for judgments of acquittal?

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[37] THE COURT: I'm going to take a short recess to consider the application of this statute to this situation.

[Recess.]

THE COURT: Well, I've come to the following conclusions on the general principle asserted by Mr. DiMento in his first motion. I am persuaded that under the Federal statute, it is not necessary that each defendant could be convicted under the State statute. It's necessary that the conduct prohibited by the State statute be found by the jury to have existed and that a defendant to be convicted must be found

to have joined in that enterprise in some way, to aid it, being somebody other than a bettor. For that proposition I rely on [38] just one of many cases that deal with this point, United States versus Berger at 461 F. 2d 230, which was in the Court of Appeals for the Second Circuit.

On the point of what constitutes $2,000 of bets, the cases, as I read them, do not go to the point of actual cash receipts for the day, but in terms of wagers taken, and the question about the parlay is an interesting one, but it perhaps raises a more refined issue than Congress contemplated, and I think is properly included under the wagers handled in the course of the day, which is what the case talked about. Of course, the difference between the wagers and the cash receipts, because the wagers are made over the phone and I take it the settlement may be some other time, obviously, can't be contemporaneous with the wager.

So on all these various bases that were argued, I'm denying all of the Motions for Judgment of Acquittal.

MR. DIMENTO: Excuse me, your Honor. Is the numbers still in the case?

THE COURT: Excuse me?

MR. DIMENTO: I was asking, is the numbers pool allegation still in the case?

THE COURT: Yes. I think that's included.

[39] MR. DIMENTO: Under 17?

THE COURT: Under 17. That's a game, considered by people a game, to see what number will turn up. Yes, I think that's a game.

Do you have any case that says it's not included?

MR. DIMENTO: Never in the history of Massachusetts has the number pool been prosecuted under this.

THE COURT: That is not conclusive. Maybe they'll start after this case.

MR. DIMENTO: That is too bad.

THE COURT: I don't think it's conclusive. If you don't have a case that says it's excluded, I would rule it was included. State authorities may have a tighter statute that they would feel happier with, but I think it's included within the game.

MR. DIMENTO: The result, you're saying the number depends on the result of a game?

THE COURT: No, I think the business of relying on a number is itself a game. See what number turns up.

MR. DIMENTO: I see what you're saying.

[40] THE COURT: A game of chance, as they say.

MR. DIMENTO: The point I was making, your Honor, is that the game that they intend as a game in the ordinary way we think of it —

THE COURT: Like a football game.

MR. DIMENTO: — the number depends on the amount bet. It doesn't depend upon the results of any game.

THE COURT: No, but it is itself a game.

MR. DIMENTO: Well, I think that is a novel interpretation of the Massachusetts law.

THE COURT: In any case, I don't know whether it makes all that difference, because we have evidence as to horse bets.

MR. DIMENTO: It cuts the evidence in half or more, your Honor.

THE COURT: Well, I'm going to let it stand. I'll let it stand. There adds to it a very large number of interesting questions in this case, but I'm going to let it stand. I think it's included, at least for the purposes of 1955.

We have the indictment around here somewhere. I think it's a closed question.

MR. DIMENTO: See, under the Massachusetts law number pool is considered to be a lottery, your Honor.

[41] THE COURT: Yes.

MR. DIMENTO: I was relying more on your experience I thought you might have had in the local District Attorney's Office, since I didn't realize you spent all the time in the heavens.

THE COURT: That was in Plymouth County.

MR. DIMENTO: No bookies.

MR. REDMOND: None that were arrested.

THE COURT: It's a lottery, isn't it?

MR. DIMENTO: It's a lottery.

THE COURT: And a lottery is a game. It's a game of chance.

MR. DIMENTO: Well, no, not exactly, your Honor. This statute is not selling pools upon a lottery. This statute states it's a crime to sell pools upon a game. You are not selling pools upon the game, you're selling pools upon a number that comes out by parimutuel, under the parimutuel system. The game is the horse race. That is only indirectly involved. But the inure of the horse race doesn't determine the number.

THE COURT: No, I understand that. That would be the contest of speed of beast.

MR. DIMENTO: Right, or upon the result of a game. That is not a game, because it is not a [42] contest. A game requires some kind of skill or play between people.

THE COURT: No, a lottery via game, isn't it? Isn't that what our Government calls it when you buy those little green things down at the — that's called The Game, isn't it?

MR. DIMENTO: But it really isn't a game under our Massachusetts statute. It's not thought to be a game any more than dice is a game.

THE COURT: I always thought that was a game. For some people it's a business, I know, but I always thought of it as a game.

MR. DIMENTO: The Game, or a game under Massachusetts law requires some kind of skill. It's a contest whether it be mental or physical.

THE COURT: Some people who are bettors are said to be in the activity of gaming.

MR. DIMENTO: Those are generic terms, but now we are getting down to the bare bones of our Massachusetts law, our statutes here, and the number pool is considered a lottery, sports.

THE COURT: You say that the term "game," as it appears in Section 17, is not used in its generic sense but in a specific, particularized sense of a football game or hockey game?

[43] MR. DIMENTO: Yes, exactly. This game that we're talking about is a result of the amount of money bet by people.

THE COURT: Do you have any case that says so?

MR. DIMENTO: As I said, your Honor, they never prosecute under this statute. It's just never been done. Every Massachusetts lawyer just understands that that's sports, and horses, and dogs, and the lottery is the number pool.

THE COURT: Whole crowds of lawyers get shocked all the time. I can't go by that.

Think of what the Supreme Court does to us every session in terms of causing us to review our concepts.

Mr. Jigger, do you have anything to add on that?

MR. JIGGER: Your Honor, I would just point out that the statute speaks in terms of whoever keeps a room or is found present and enumerates the other factors. The crime, from my limited knowledge of Mass. State law, is being found either present or maintained in a room.

THE COURT: "For registering bets, or buying or selling pools, upon the result of a trial [44] or contest of skill,

speed or endurance of man, beast, bird or machine, or upon the result of a game, competition, political nomination, appointment or election," and then it goes on to say or whoever is present is to be punished the same way.

The point is, having been found somewhere, what other kind of apparatus is it? And if Mr. DiMento is right, we would have to exclude from the evidence in the case all of the evidence that has to do with bets or numbers.

MR. JIGGER: Your Honor, the Government would submit that that does not necessarily follow.

THE COURT: Why not?

MR. JIGGER: Because the Defendants have been charged with operating a gambling business, which is in violation of State law. Now, there's no question that the horse race aspect of it is in violation of State law. There are other aspects to the bets as well, but the violation of State law is merely a jurisdictional element which must be satisfied prior to the initiation of Federal prosecution.

THE COURT: Right.

MR. DIMENTO: This is not my Motion for Acquittal, this is simply on the motion, perhaps, to strike or limit the evidence. It will have [45] relevance for the requests for instructions, I guess, my request 29.

THE COURT: This points to the jurisdictional thing. You're saying that if the — yes, but you have to prove the kind of illegal gambling business which you have charged, just the same even though it's jurisdictional, and you've charged the gambling business which is in violation of Section 17.

MR. JIGGER: Your Honor, you know, to run to the basic point here —

THE COURT: This whole subject is referred to as gaming. I mean, that is the generic term for this entire kind of an operation. I'm going to deny the motions.

Let's go forward.

MR. REDMOND: Your Honor, could I —

THE COURT: It's an interesting point, but I'm going to deny the motions.

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[73] MR. DIMENTO: Well —

THE COURT: Do you want to use it, Mr. Jigger?

MR. JIGGER: Yes, I intend to use it.

MR. REDMOND: He wants to use it now, your Honor.

MR. JIGGER: No, your Honor, I intended to use if before, as I intend to use the other chart.

THE COURT: I think he's entitled to use the chalk in his argument.

MR. REDMOND: May we adopt all of the Defendants' requests for instructions and may your rulings be applicable as to all of us?

THE COURT: Do you mind that, Mr. DiMento?

MR. DIMENTO: No, but I think another important piece of housekeeping is we should renew, now that all the evidence is closed, our respective motions for judgment of acquittal.

THE COURT: All right. They are considered renewed and denied.

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[75] [the following is outside the presence of the jury.]

THE COURT: I am going to reverse a ruling that I have made. You better sit down and get braced for that.

In waffling around with the citations under 271 17, I came across a case called Commonwealth versus Boyle, 346

Mass. 1, in which Boyle was indicted under both 7 and 17, and there were booking slips identified as such by experts.

The question was whether that was sufficient identification of these documents as booking slips, and in the course of the discussion on Page 4, the Court said, "The position of any recorded memorandum intended to be a [76] minute of a bet is sufficient to demonstrate a violation of either GL Chapter 271 Section 7 or Section 17 or both of these sections depending upon the contents of the memorandum." From which I am led to the conclusion that Mr. DiMento was right in his argument and that at least it has been considered by the Supreme Judicial Court, Section 17 does not include the numbers aspect, so that while I am not going to grant a Motion for Judgment of Acquittal on that basis, I will grant the Motion to Strike so much of the evidence in the case as has to do with numbers betting.

Now, I don't think with respect to the physical evidence we have had that we distinguished, and I'm not sure that it can be done, but I'm going to instruct the jury to disregard it without trying to at this point sort out the exhibits, unless you feel you can do that.

MR. DIMENTO: Well, I think we could use another recess, your Honor, to reorganize ourselves. Surely, our argument has to be reorganized.

THE COURT: Yes, I'm afraid they do. Now I don't know whether the Government can sort these out. Is Mr. Cross still around?

MR. BOUDREAU: No, your Honor, he's not.

THE COURT: I don't think there is any question about it. I think this Boyle case, unless it's been subsequently overruled and I doubt that it has, because [77] it's fairly recent as Massachusetts cases go.

MR. REDMOND: If that's so, your Honor, then will your Honor instruct the jury, will he entertain, excuse me,

motions to strike any conversations? I presume you will, your Honor, on the tapes, having to do with number play? That would seem to be the logical extension, your Honor, of that ruling.

THE COURT: Yes, I think that's right.

MR. REDMOND: Then we do need some time, your Honor. Bear in mind, I wrote the numbers 3150 on the board, 35 taken from it, tapes, two conversations were put in against my fellow.

THE COURT: None of which had to do with numbers. It had to do with that parlay and Mr. Lusk.

MR. REDMOND: That was one phone conversation, your Honor.

THE COURT: Yes.

MR. REDMOND: But there was another one that was between, supposedly between, Arthur and Teddy, if I remember correctly.

THE COURT: That still had to do with Lusk. I'm pretty sure they're both on the same day, Considine and Arthur Plotkin. Let's see, Considine and Harvey Plotkin, yes, then there's a previous one, Harvey Plotkin, and Arthur Plotkin, you're right.

[78] MR. REDMOND: That is the one I am talking about, your Honor.

THE COURT: That had to do with numbers.

MR. REDMOND: I want that stricken, your Honor.

THE COURT: All right, it's stricken.

MR. JIGGER: Your Honor, the Government at this point would argue that all of this evidence is evidence of similar acts which would be admissible in the case consistent with your Honor's earlier ruling. The Government would also, for purposes of the record, indicate perhaps I'm a little unclear, but the registering bets or playing or selling pools

here would also encompass the conception of a numbers operation based upon —

THE COURT: Registering bets or playing pools upon the result of all of these things, you have to follow the grammatical construction. But in any case, this Boyle case seems to dispose of it.

MR. JIGGER: It would be just our suggestion to the Court that Agent Cross —

THE COURT: You leave this stuff in with an instruction that they are not to consider it as an independent item, is that what your thought is?

MR. JIGGER: Yes, your Honor.

MR. GOLDBERG: Your Honor, in keeping —

[79] THE COURT: I think in the case of Arthur Plotkin that would be given the very small amount of evidence on any other point, that would be highly prejudicial. I'm going to strike that conversation.

MR. GOLDBERG: May I call the Court's attention to the conversation which involved Mr. Silverman on June 5, 1971?

THE COURT: What number is that? Do you have these things numbered?

MR. GOLDBERG: Mine are not numbered, your Honor.

THE COURT: Julius Silverman is only on two of them. The one with Considine?

MR. GOLDBERG: The one with Jackie, and they talk about a bet, someone named Larry DeLounge.

THE COURT: Yes, what about it?

MR. GOLDBERG: I assume this is the type of conversation, also, that ought to be stricken.

THE COURT: Well, I don't recall it. What do you say it is? Do you say it's a numbers bet? You've got transcripts of the thing, I don't.

MR. GOLDBERG: I have it here, your Honor.

THE COURT: All right, let's take a look.

MR. REDMOND: That is either number 16 or 17 my notes reflect, your Honor.

[80] THE COURT: Now, what did we say, there was some discussion of what a bleeder was?

MR. REDMOND: That is a numbers bet, your Honor, I believe.

THE COURT: Yes. Two digits of the number is the bleeder, and he had a two dollar bleeder. This is where the guy gets to make a sawbuck.

MR. GOLDBERG: That's right.

THE COURT: The writer or somebody gets to make a sawbuck. I'm going to strike that, too.

What about Julius' next call, Jackie and Julius, New York for two, seventh race, the one at Suffolk. Okay he's in the horse business there.

MR. DIMENTO: We could make it a serious question with Sanabria, now, because he's only in the numbers conversation. He's probably entitled to a judgment of acquittal. There is nothing to give to the jury on him.

THE COURT: Which one is he?

MR. DIMENTO: He has to go to work this afternoon, too.

THE COURT: I'm not going to base a discussion on that.

MR. DIMENTO: He did want to get out early. He's on number eleven.

[81] THE COURT: Number eleven, Bonnie Glixman and Thomas Sanabria. All right, do we have that transcript?

MR. DIMENTO: Yes.

THE COURT: Let me take a look. That's it. Is that the only call we have with Sanabria?

MR. DIMENTO: We have somebody, it's not Sanabria, an unknown female, giving in some numbers charging them to Tommy, and that's it, all number thirteen. I don't know if that is properly charged to him at all.

THE COURT: It's charged under TS.

MR. DIMENTO: That is numbers, anyway.

THE COURT: Well, that may be something, there.

MR. ALBERINO: If your Honor please, with regards to Dominic Serino, there are some conversations here that I think ought to be considered also, twenty through twenty-five.

THE COURT: There is a whole mess of them. Let me take a look at those.

MR. JIGGER: Your Honor, at this point I think the Government would like to indicate again for the record our contention that the violation of the state law is a jurisdictional element which has to be established for the business as a whole.

THE COURT: Yes, but it has to be established in the terms that you charged it, which was as a [82] violation of Section 17. You're stuck with your indictments. I think if you charged a double, as a present case coming up as both 7 and 17, this one, Santarpio, that I'm working on this afternoon, but you didn't, you said 17 and you're stuck with it. It must be proved as charged.

MR. JIGGER: Well, your Honor, the Government would just indicate the dichotomy in this case, in this situation.

THE COURT: It doesn't appear whether this is numbers or not. They're just complaining. First at Suffolk, fourth at New York, second at Jersey.

MR. ALBERINO: Then they switch over to the numbers.

THE COURT: Well, since there is horse betting in the conversation, we're going to leave them in.

MR. ALBERINO: There is some in there that should be stricken, your Honor.

THE COURT: Which one is stricken? The top three Jersey, dollar combination, 409, 902, all right. That sounds like strictly numbers. That is number 23?

MR. ALBERINO: Yes, your Honor.

THE COURT: Number 23 is sports and numbers. The first one on numbers is 20. 21 stays in. 22 stays [83] in. 23 and 24 are out.

MR. JIGGER: Your Honor, is the Government to understand that you've departed from your earlier reasoning on the sports wagers and are now removing all the evidence that has any indication of numbers bets despite —

THE COURT: No, but there is one conversation that has nothing in it but numbers and sports, so I'm knocking it out.

MR. JIGGER: Well, your Honor, the Government would draw your attention to the ruling earlier on the sports bets, and —

THE COURT: I recall it. I recall that, and I had it in mind. I'm not striking all the sports bets, but here there is a particular conversation that has no probative value in the case. You've got other conversations.

Now, I don't like to be in a position of reversing myself any more than you like to have me do it, but the cases are there.

MR. DIMENTO: Your Honor, numbers 18 and 19, which refer to Moccia, are only numbers.

THE COURT: All right.

MR. DIMENTO: And he may be in the position of Sanabria, entitled to a judgment of acquittal of [84] there being no evidence against him except numbers talk.

THE COURT: I'm going to come to that. Do you have the Moccia transcripts?

MR. DIMENTO: Yes, right here, 18 and 19.

THE COURT: 18, but 19 is horses.

MR. DIMENTO: Excuse me?

THE COURT: This is horses.

MR. DIMENTO: It doesn't leave very much on the case.

THE COURT: No, it doesn't, but it does leave something. The numbers, 18 is out.

All right, do you have any evidence against Sanabria, Mr. Jigger, other than the telephone call involving numbers?

MR. JIGGER: Your Honor, one of the telephone calls —

THE COURT: Received by somebody who identified himself as Sanabria.

MR. JIGGER: Yes, that's correct, your Honor. Not only that, I would draw your Honor's attention to the telephone call in which an unidentified female called in and requested that certain numbers be charged to the account of Thomas Sanabria.

THE COURT: No, she did not. It was Tommy.

[85] MR. JIGGER: Then it was responded Sanabria, Tommy or Frank.

THE COURT: I don't recall that. Do you have it there?

MR. DIMENTO: In any event, it's still numbers.

MR. JIGGER: Your Honor, the point is, though, the call indicates his code is TS, and I believe in the physical evidence there are horse bets with TS on them, although I will have to check on that, your Honor.

THE COURT: Well, where does it appear that his code is TS?

MR. JIGGER: "Charge them to TS. Okay, that's Tommy."

THE COURT: "Have any numbers? Yeah." "Who's this?" Unidentified female response: "Sanabria."

Jackie then responds: "Who should I charge them to?" Then he says, "Tommy, charge them to TS. That's Tommy, okay."

You haven't based your charge on Sanabria on anything that he did, only on what somebody else is saying, and in order to do that you have to make a preliminary showing

that Sanabria was connected with this operation, and by that I mean a horse operation. I [86] don't think you've done it. The Motion for a Judgment of Acquittal as to Sanabria is allowed.

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[88] THE COURT: Your position on the law, gentlemen, must have been known to you before today, and, in fact, nobody even cited the Boyle case to me. I happened to come across it more or less by accident. I'm sure the Government wishes that I had gone out there and simply drank a cup of coffee or something. I came across it, and the issue had not been raised [89] until this time.

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[90] THE COURT: Well, I think everybody is going to have to — I think this ruling that I've just made comes as not only a surprise to me, it comes also as a surprise to all of the attorneys in the case, and I think not only the defense, but probably the Government will want some time to regroup and consider what their arguments are and what is left of the case. It's a shame this matter came to light so late in the case, because we clearly have put a lot of time and energy and caused a lot of evidence to be introduced, which as I now believe, are not within the scope of the indictment, of the description of the illegal gambling business that is charged in the indictment. So we're going to have to go over this. I'm inclined to think perhaps we should put the whole case over until tomorrow morning for arguments and charge.

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[93] THE COURT: I bet you do pretty well. This case is continued until nine o'clock tomorrow morning.

Counsel, I'm going to ask the jury to come down. I think they are entitled to a brief explanation of what is going on, rather than tell them to go home and come back tomorrow.

[Whereupon the jury entered the courtroom]

THE COURT: Ladies and gentlemen, this case has suddenly taken a turn, that is, there has been a change in it resulting from a ruling of mine, which had to do with the nature of the business which is charged as being in violation of the laws of the Commonwealth in the indictment. The indictment refers to Massachusetts General Laws Chapter 271, Section 17. That is the only section referred to.

It has been the theory of the case up to this point that that section prohibited a gambling business that included numbers, as well as horses and dogs, and other kinds of contests. As a result of some [94] research that I did in response to arguments presented this morning, I have come to the conclusion that that is not so, that the section charged does not include the numbers or lottery aspect, and that that is charged under another section of the Massachussetts laws.

Therefore, I have made an order to strike so much of the testimony as has to do with numbers bets, and that ruling requires some specific orders as we review the exhibits, and the phone calls, and so on that you've heard. Now, of course, this changes the case quite a lot and requires counsel to go through the records and identify those things which are still admissible under the ruling that I've made, and those things which are not admissible and must be stricken. So they're going to spend the afternoon on that.

I said I had hoped to complete this case today, but I don't think it's possible, because this changes the character of the case. This requires some additional effort on everybody's part. I'm going to suspend with this case now and resume tomorrow morning at nine o'clock, at which time all that will be left in the case will be arguments and the charge. I will instruct you specifically at that [95] time as to the evidence which has been stricken from the case. We will see you then.

. . . . . .

United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

[Title omitted in printing.]

Government's Motion to Reconsider.

The United States of America by and through its attorneys hereby moves that the Court reconsider its ruling of November 18, 1975, striking from the instant case evidence concerning the operation of an illegal parimutuel numbers pool by the defendants herein, reverse said ruling, and allow the Government to amend the indictment, and in support thereof states as follows, to wit;

The indictment charges that, between June 1, 1971, and November 13, 1971, the defendants did "conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a parimutuel number pool and on the result of a trial and contest of skill, speed, endurance of beasts, said illegal gambling business; (i) was a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which state said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in a single day, all in violation of Title 18, United States Code, Sections 1955 and 2."

The Court granted defendants motion to strike the evidence relating to the operation of an illegal parimutuel numbers pool on the grounds that Section 17 of Chapter 271 of the laws of the Commonwealth of Massachusetts, which is the specific section of the Massachusetts law set forth in the indictment does not encompass this form of illegal gaming.

The Government requests leave of the Court to reopen its case and amend the indictment by adding Section 7 of the M.G.L.A. following the reference to Section 17 of said statute.

Both Rule 7(c) of the Federal Rules of Criminal Procedure and the relevant case law demonstrate that miscitation of a statute in the indictment is a technical error subject to correction by amendment of the indictment since it is an error of form not substance.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that an indictment "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged".

The fundamental requirement of an indictment is to furnish the accused with such a description of the charge as will enable him (1) to prepare his defense, (2) to protect him against double jeopardy, and (3) to inform the court of the facts alleged so that it may decide if they are sufficient in law to support a conviction. *Russell* v. *United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L.Ed.2d 240 (1962); *Hagner* v. *United States*, 285 U.S. 427, 52 S. Ct. 417, 76 L.Ed. 861 (1932); *United States* v. *Addonizio*, 451 F.2d 49 (3rd Cir. 1972); *Anderson* v. *United States*, 262 F.2d 764 (8th Cir. 1959); *United States* v. *Lamont*, 236 F. 2d 312 (2nd Cir. 1956).

It is fundamental, of course, "that an indictment may not be amended except by resubmission to the grand jury unless

the change is merely a matter of form." *Russell* v. *United States*, 364 U.S. 749, 770 (1962). The indictment can, however, be changed or amended in a number of "formal" ways so long as the defendant is not subject to conviction for a different crime than that charged by the grand jury. Pursuant to Rule 7 (d), F.R. Cr. P., a Court, upon motion of the defendant may strike prejudicial surplusage from an indictment. The Court may also withdraw particular counts of an indictment from the consideration of the jury, upon motion of the prosecutor or defendant, pursuant to Rules 14, 29, and 48 (a), F.R. Crim. P. These actions technically amend or alter the original indictment returned by the grand jury, but are expressly permitted by the rules, and do not deprive the Court of jurisdiction to proceed.

The "settled rule" of *Russell*, *supra*, allowing amendments of form, is most commonly applicable when the indictment contains either a statutory miscitation or a typographical error as to a date. Indeed, Rule 7 (c), F.R. Crim. P., provides inter alia, "Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." Rule 7 (c) is applicable to statutory miscitation whether the miscitation appears on the margin, caption or body of the indictment. In *Davis* v. *United States*, 279 F.2d 576 (4th Cir. 1960) an indictment for conspiracy to traffic in heroin charged that the offenses contemplated by the conspiracy were in violation of the Harrison Act and Acts amendatory thereof. Technically the Harrison Act had been repealed rather than amended, and similar laws were enacted to replace it. This misreference to the Harrison Act occurred in the "body" of the indictment rather than in the violations section. It was argued to the Fourth Circuit that the indictment was invalid as on it did not allege a

conspiracy to violate current federal law. The Court rejected this hypertechnicality, holding that the indictment clearly charged a conspiracy to traffic in heroin which was, in fact, a violation of federal law.

> "In keeping with the spirit, at least, of Rule 7 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C., it was appropriate to cite the statute which makes unlawful the conduct in which it is charged, the conspirators planned to engage. The rule expressly provides, however, that error in the citation, or its entire omission does not vitiate the indictment unless the error or omission had misled the defendant to his prejudice. There was no showing here that the defendant or his counsel, was in any way misled, much less prejudiced, by the reference to the Harrison Act rather than to the appropriate sections of the current code . . ." 279 F. 2d at 578

In *Stewart* v. *United States*, 395 F.2d 484 (8th Cir. 1968) the indictment charged the defendant under the Dyer Act with theft of an airplane "on or about July 21, 1967." The actual date of the crime was June 21, 1967, and the trial judge amended the indictment to correct the clerical error. The Eighth Circuit held that the date was not an essential element of the crime, and since the rest of the indictment sufficiently informed the defendant of the elements of the offense, the amendment was proper.

> "By reason of our constitutional provisions, an indictment cannot be amended in a substantial material

> way so as to broaden or change the charge or to prejudice an accused by failing to fully apprise him of the charge against him, but it would be wholly impractical and not required by any rule of law to vitiate this indictment by reason of the correction of a clerical error that was not of the essence in connection with the charge of the commission of the crime." 395 F.2d at 488.

In *Williams* v. *United States*, 179 F. 2d 656 (5th Cir. 1950) aff'd, 341 U.S. 97, the indictment charged the defendant with bringing a victim "into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co." and acting under color of law assaulting the victim. At the close of the Government's case the court amended the indictment striking "Lindsley Lumber Co., a corporation" and inserting "Dania Supply Co., a corporation, doing business as Lindsley Lumber Co". The Fifth Circuit upheld this amendment on appeal, since the gist of the offense charged was whether the defendant violated the victims' rights under color of law. The identity of the Corporation, whose theft the defendant was investigating, "is not a matter of substance and the amendment . . . was without the slightest prejudice to the appellant." 179 F.2d at 659-660.

In *United States* v. *Mills*, 366 F.2d 512 (6th Cir. 1966) an indictment charging a conspiracy to violate the Mann Act alleged as an overt act that the defendant telegraphed money to one "Ted Mason". The trial judge in his charge to the jury orally amended the then obvious mistake in the recipient's name to read "Ted Jackson." The Court of Appeals affirmed the conviction treating the amendment as

a non-material variance which did not mislead or prejudice the defendant, or affect his substantial rights. Cf. *Dye* v. *Sacks*, 279 F.2d 834 (6th Cir. 1960), cert. denied, 358 U.S. 45. In view of this authority a statutory miscitation is clearly a matter of form, and error in the citation does not affect the substantive facts alleged in the indictment. It is well settled that if the indictment charges acts illegal under an existing federal statute, it is not invalidated for failure to refer to the statute or for specifying the wrong statute." *Pettway* v. *United States*, 416 F.2d 106, 108 (6th Cir. 1954), cert. denied 355 U.S. 918.

In *United States* v. *Fruchtman*, 421 F.2d 1019 (6th Cir. 1970) defendant was charged with interference of an investigation by the Federal Trade Commission in violation of 18 U.S.C. §1503. The indictment alleged that the agency investigation which was obstructed was being carried out pursuant to 15 U.S.C. §13a. At the conclusion of the opening statement by the Government, defendant called to the attention of the trial judge the fact that the indictment contained a miscitation of a federal statute. Following argument on what it treated as defendant's motion to dismiss, the trial Court allowed the Government to amend the indictment to charge violation of 15 U.S.C. §13(a) an entirely different statute from 15 U.S.C. §13a. On appeal from conviction by a jury, defendant contended the Government had impermissibly amended the indictment. In affirming the conviction, the Court of Appeals held at p. 1021 "The original indictment fairly stated the *facts* upon which the charges were based, but in describing the investigation conducted by Smeraldi it was erroneously stated that he was proceeding upon Section 13a instead of 13(a) of Title 15, United States Code, Appellant has not demonstrated that he was misled or prejudiced by reason of

the amendment. The amendment was a nonprejudicial change of form and was properly permitted to be made." (citations omitted) (emphasis added)

The instant indictment adequately set forth the elements of the federal offense proscribed, the conducting of an illegal gambling business in violation of 18 U.S.C. §1955, and provided sufficient notice of the government's charges. See e.g., *United States* v. *Marrifield*, 515 F.2d 887, 883 (5th Cir. 1975), where the Court ruled that an accusation that the defendants "did knowingly and willfully conduct . . . an illegal gambling business to wit, a business for placing bets on dice and cards" constitued an adequate notice of a violation of state law. *United States* v. *Marrifield*, 496 F.2d 1278, 1282 (5th Cir. 1974). Cf., *United States* v. *Kenny*, 462 F.2d 1205, 1213-1215 (3rd Cir. 1972), *cert. denied* 409 U.S. 714 (1972). Here, the indictment alleged that the defendants conducted an illegal gambling business which accepted bets on a parimutuel numbers pool, that it involved five and more persons, that it was in operation for thirty days and that it had a gross revenue in excess of $2,000 in a single day.

Even if the sections of the state statute cited in the indictment should have been both M.G.L.A., Chapter 271, Section 7, and Section 17, the omission of reference to a specific section of the statute relating to operation of an illegal numbers pool is not grounds for striking evidence of such nature since the error did not mislead the defendant in his prejudice. *United States* v. *Van West*, 455 F.2d 958 (1st Cir. 1972); *United States* v. *Rosenson*, 291 F. Supp. 867, 870 (E.D. La. 1968), aff'd, 417 F.2d 629 (5th Cir. 1969), See also *United States* v. *Calabro*, 467 F.2d 973, 981 (2nd Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). The proper remedy is to allow the Government to correct

the technical error in the indictment. See *Van West, supra.* See also *United States* v. *Fruchtman,* 421 F.2d 1019 (6th Cir. 1970), *cert. denied,* 400 U.S. 849; *United States* v. *Clark,* 416 F.2d 63 (9th Cir. 1969).

The question is whether the amendment to an indictment which charged crime "X" so changes the indictment that it now charges crime "Y" thus depriving the defendant of a substantial right. The amendment requested by the Government in this case performs no such function. The instant indictment informed the defendants of the charges against them with enough specificity to enable them to prepare any defenses they might have had to the allegation that they operated an illegal gambling business in violation of state law which was in violation of 18 U.S.C. §1955 and 2.

In addition the defendants, if convicted, could plead their conviction in bar to any further prosecution of operating the illegal gambling business charged herein.

> "Non-prejudicial errors and defects do not invalidate indictments which otherwise fulfill the two prime requisites of informing the accused of the nature of the charge and defining the scope of a future plea of double jeopardy . . . the essence of this principle is found in Rule 52(a) of the Federal Rules of Criminal Procedure which states that 'any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" *United States* v. *Levinson,* F.2d (6th Cir. 1968)

WHEREFORE, the Government prays that the Court reconsider and reverse its ruling allowing the motion to

strike the evidence pertaining to the illegal parimutuel numbers pool and then allow the Government to amend the indictment to include specific reference to Section 7 of Chapter 271, M.G.L.A.

Respectfully submitted,
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United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

[Title omitted in printing.]

Government's Motion that this Court Reconsider its Granting of Defendant Sanabria's Motion for Judgement of Acquittal, and for Other Appropriate Relief.

The United States respectfully moves this Honorable Court to reconsider its decision granting defendant Thomas Sanabria's motion for judgement of acquittal, to deny said motion and to order that Sanabria continue as a defendant in the trial of this case.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION.

On November 18, 1975 this Court granted the motion of Thomas Sanabria to grant him a judgement of acquittal. Sanabria's motion was made and granted after the jury had been sworn, evidence had been presented and both sides had rested. Ordinarily prosecution terminates upon a judgement of acquittal *Fong Foo* v. *United States*, 369 U.S. 141 (1962). The granting of Sanabria's motion for judgement of acquittal arose out of extraordinary circumstances, however. The Government contends that nothing in the Fifth Amendment's double jeopardy clause or the laws of the United States prohibits this Court from returning both the United States and Sanabria to the status quo ante his

"acquittal" and permitting this prosecution to proceed to a verdict by the jury.

At the close of presentation of evidence in this case this Court reversed its prior ruling and granted Sanabria's motion to strike evidence relating to a parimutual numbers pool alleged to be conducted by the defendants. The reason for this action was this Court's determination that the indictment failed to allege that the parimutuel numbers pool was in violation of the laws of the Commonwealth of Massachusetts because of the indictment's reference to M.G.L.A. Chapter 271, Section 17, which statute this Court held not to apply to betting or numbers. On the basis of these rulings Sanabria moved for a judgement of acquittal. This Court granted the motion after finding that the only evidence against Sanabria related to an illegal numbers business and this Court had determined that the indictment was fatally defective in that it failed to charge an illegal numbers business in violation of Massachusetts law.

In the less than 24 hours that have passed since this Court made the rulings in question the jury remains empanelled to try what is left of the case, and nothing further has transpired in front of the jury in Sanabria's absence.

The Government contends that this Court was in error in making the above described rulings. In support of this contention the Government incorporates by reference its companion Motion to Reconsider the Striking of Evidence concerning the Operation of an Illegal Parimutuel Numbers Pool. The thrust of this memorandum is to establish that this Court can properly reverse its judgement of acquittal for Sanabria.

There is no question that jeopardy has attached in this case. This conclusion begins, not ends, the inquiry into whether Sanabria can be made to continue in this trial or

whether the double jeopardy clause bars any further trial of the facts of this case. *Illinois* v. *Somerville*, 410 U.S. 458, 467 (1973). The Supreme Court has only last term indicated that questions of double jeopardy cannot be settled by talismatic use of the concept of acquittal. *Serfass* v. *United States*, 95 S. Ct. 1055, 1064 (1975).

Basically this Court has ordered a judgement of acquittal for Sanbria because it felt that the indictment failed to state an offense involving numbers gambling. While this Court has entitled its action a judgement of acquittal such a characterization of its ruling cannot control the classification of the action for purposes of appellate review. *United States* v. *Jorn*, 400 U.S. 470, 478 n. 7 (1971). This principle should also apply when the trial Court reconsiders its own actions.

In this case the jury who is the primary factfinder has made no determination of guilt or innocence on the merits. The Court has made a ruling which is purely legal — that the indictment does not state an offense. What is labelled as an acquittal flows from this legal ruling, but is not a conclusion or guilt or innocence by the factfinder. The trial has been terminated upon mid trial motions of the defendant upon an issue of law.

A recent Fifth Circuit case, remarkably similar on its facts to the instant one, shows that the Double Jeopardy clause does not bar further trial of Sanabria. In *United States* v. *Kehoe*, 516 F. 2d 78 (5th Cir. 1975) defendants were indicted for embezzling certain land from a savings association in violation of 18 U.S.C. § 657. After the jury was empanelled and the Government had presented its case-in-chief, the defendants moved for a judgement of acquittal on the ground that the indictment failed to state an offense since real property cannot be the subject of an embezzlement under § 657. The motion was granted. The

defendants were reindicted on the same facts, charging a violation of 18 U.S.C. § 1006. The District Court dismissed the second indictment citing the former acquittal as a bar to reprosecution.

On appeal the Fifth Circuit reversed holding that the original "acquittal" was only an apparent acquittal. It was really a discharge of the defendants after jeopardy has attached on the grounds that the indictment is incurably defective. In such a case retrial would be permitted after an application of a balancing of the defendants' interest to minimize the total period of jeopardy against the public's interest in justice. In *Kehoe* the balance fell on the side of retrial. In *Sanabria* this Court should make the same balancing of interests and order that Sanabria continue to a verdict on the merits by the jury.

Given the peculiar fact that this trial is still in session Sanabria's "acquittal" is not graven in stone. If the apparent acquittal is, like that in Kehoe, really a granted motion to dismiss it can be retracted by the Court.

> "We hold that under these circumstances the oral ruling has no legal significance and is not a judgement of acquittal barring further prosecution. The oral ruling of a trial judge is not immutable, and is of course subject to further reflection, reconsideration and change."

United States v. *Green*, 414 F. 2d 1174 (D.C. Cir. 1969)

Except for a few hours of happiness the position of Sanabria has not significantly changed as a result of this Courts ruling. The jury is still there suspended in legal time. Procedurally we are no further along than if this motion to reconsider were made an instant after the Court's

ruling. As *Kehoe* points out while Sanabria's belief that he has been acquitted is relevant to the Court's determination of the motion it is not conclusive. The Government has a paramount interest in a decision on the merits. The relief asked for in this motion would achieve a desirable result with no appreciable further burden on the Court since this trial will proceed anyway. This is far preferable to a whole new trial on the merits for Sanabria should the Government prevail on appeal of an adverse ruling on this motion.

Respectfully submitted,
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MARTIN D. BOUDREAU
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Special Attorney

United States District Court
District of Massachusetts

CRIMINAL No. 72-326-S.

[Title omitted in printing.]

Excerpts from Transcript of Seventh Day of Trial.

[2] [The following is without the presence of the jury.]

THE COURT: Let's see who is missing.

MR. GOLDBERG: Mr. Redmond is not here, yet, your Honor.

MR. DiMENTO: Your Honor, may we have a moment to read this brief?

THE COURT: What brief?

MR. BOUDREAU: The Government has a Motion to Reconsider.

THE COURT: Do you have a brief?

MR. BOUDREAU: Yes, your Honor.

THE COURT: Perhaps I could take the time to read it, too.

All right, I've read it. Who is going to argue this?

MR. BOUDREAU: I am, your Honor, if I may.

THE COURT: Yes.

MR. BOUDREAU: Before proceeding, I would like to advise the Court that Mr. McDowell will argue at the conclusion of this motion, your Honor.

THE COURT: It depends upon the result of this motion.

MR. BOUDREAU: That's correct, your Honor. I just want to bring it to the Court's attention at [3] this time.

THE COURT: All right.

MR. BOUDREAU: Your Honor, the brief, which has just been submitted to the Court, contains a Motion to Reconsider the Court's ruling of yesterday's striking of evidence relating to the operation of an illegal parimutuel numbers pool, which was based on the Court's interpretation of Section 17 of the case of Commonwealth versus Boyle.

The Government would submit, your Honor, that under the Federal Rules relating to the pleading, the essential requirement is that the indictment contain an allegation of fact and that there be facts recited in the indictment which are sufficient to charge the offense and apprise the Defendant of the accusation to which he is to face, and that if an error is made in the citation of a statute, that that error is not a totally defective one, because it is not a matter of substance but rather a matter of form which can be corrected if the Defendant has not been misled to his prejudice.

I point out, your Honor, the indictment in this case specifically sets forth that the type of illegal gaming business to which the Defendants are [4] charged is the operation of an illegal parimutuel numbers pools and horse and dog racing, in violation of the laws of the Commonwealth of Massachusetts.

I submit, your Honor, that the Defendants were advised at the time of indictment of the nature of the charge that they were required to face, and that offense charged was in violation of Massachusetts General Law, the appropriate chapter.

They are based on the Court's interpretation of Section 17. That section does not encompass the parimutuel numbers pool. However, it's the Government's contention, your Honor, that the Defendants were adequately advised of the charges that they were required to face, that they

were required to face and the indictment charged a violation of Section 1955. I would submit, your Honor, in terms of pleading the indictment, as long as the facts are sufficiently set forth and the allegation required by Section 1955, that there is a violation of State law which is met, that there is not even a necessity in terms of defending against a Motion to Dismiss to set forth the specific State statute, which is violated.

In that connection, your Honor, I would direct the Court's attention to the case of United States [5] versus Kenny, which is stated in the brief.

THE COURT: I have no doubt about it. If you had cited no statute, you'd be all right. But the fact is you cited the statute, and it turns out not to be the one that covers the numbers pool. If you hadn't said anything, I don't have any doubt that it would have been a sufficient indictment. If the clause was in violation of the laws of Massachusetts, in which place said gaming business was being conducted, I think you would be home free. But having stated a section, I'm afraid that imports a specific offense.

MR. BOUDREAU: I would submit, your Honor, the requirements of 1955 are the specific elements contained within that statute, and that offense charged be in violation of State law. The offense that has been charged by the Government, the specific type of gambling business, which has been charged by the Government, is, in fact, in violation of the State law.

Now, with respect to the cases dealing with misciting of statute or incorrect citations of statutes, they all, your Honor, revolve around the question whether the Defendant has been misled or prejudiced in any way by the error in the citation [6] of the statute. We'd submit here, the factual allegations, your Honor, put the Defendants on notice, from the time of the indictment, that what the

Government was charging was the violation of the State law which supported the 1955 allegation, was the operation of a parimutuel numbers pool and a horse and contest on beasts.

In fact, your Honor, I think when the Court was making a ruling, yesterday, with respect to this question, the Court made the observation, "You're stuck with the indictment because it's clear that the theory of the Government's case and the proof of the Government's case has been a horse and numbers operation."

THE COURT: And there is support for your position in the fact that the Defendants have raised no objection to the numbers evidence all the time that it went in.

MR. BOUDREAU: Yes, your Honor.

THE COURT: Up to this point.

MR. BOUDREAU: I would submit that is a clear indication that they were aware of what they were being charged with, were not prejudiced by the miscitation or the error in the citation of the specific statute, a specific section of the statute, [7] which was contained within the indictment, and that there are two alternatives, your Honor. The Court could allow the Government to amend the indictment, which was set forth in United States versus Fruchtman, which is set forth in our brief, wherein the Defendant was charged with obstruction of investigation in violation of 18 U.S.C. 1503.

The person whose investigation was alleged to have been obstructed was a man by the name of Smeraldi, who was conducting an investigation of violations of antitrust laws. The underlying statute on which Mr. Smeraldi was proceeding was cited in the body of the indictment as is the case, here, your Honor, with respect to the Mass. General Laws. What was cited in the body of the indictment was

15 U.S. Code 13a, with no parentheses. When, in fact, it should have been 13 (a).

Now, the difference is, your Honor, they were two entirely different statutes. It's not a question of one section being next to the other or a mero matter or a minor matter of form. It's a question of the wrong underlying statute having been charged. In that instance, your Honor, at the conclusion of the Government's opening, the Defendant made a motion which the Court treated as a Motion to [8] Dismiss the indictment. The Court denied that motion and allowed the Government to amend the indictment to put in the citation of the proper statute.

On appeal the Defendant contended that the Government had been impermissibly allowed to amend the indictment, and the Court of Appeals in affirming the conviction stated, and I quote: "The original indictment fairly stated the facts upon which the charges were based, but in describing the investigation conducted by Smeraldi it was erroneously stated that he was proceeding upon Section 13A instead of 13(a) of Title 15, United States Code. Appellant has not demonstrated that he was misled or prejudiced by reason of the amendment. The amendment was a non-prejudicial change of form and was properly permitted to be made."

I submit, the citation of the proper chapter of the Massachusetts General Laws and the fact that the allegation was made that the illegal gaming business charged was in violation of State law, coupled with the factual basis for the allegation, that is, that it was in operation of an illegal parimutuel numbers pool and contest of skill on beasts, properly advised the Defendants of the charges they were required to meet and alleged all the elements of Section 1955.

[9] There is a First Circuit case I would like to direct the attention of the Court to, your Honor, the case of United States versus Van West, which is the First Circuit case, 455 F. 2d, 958, in which a Defendant was arrested on a complaint and charged with assault on a Federal officer in violation of Section 111 of Title 18, United States Code. Thereafter, a one-count indictment was returned, and he was charged with violation of Sections 113 and 114 of Title 18, United States Code, which related to maritime jurisdiction and other matters not covered within Section 111, your Honor.

The trial proceeded, and the Defendant contended that he was misled by the erroneous citation in the statute. The First Circuit held that the appellant's contention was without merit, because the facts of the indictment fairly apprised him of the charge, and from the proceedings in the case, that is, the Defendant's counsel's examination of the Government's witnesses, it was clear he was concerned with the specific allegation of the indictment which set forth a case precisely within Section 111.

The Defendant claimed he was misled by the penalty provision, which under 111 is larger than under 114, might be relevant if he had pled guilty, [10] but had gone to trial. So, I think, your Honor, both the fact the Government's contention that this is a technical error, which can be corrected, and the procedures within the trial themselves, show that the Defendants have not been prejudiced by the citation of Section 17 alone, your Honor.

THE COURT: All right. Who is going to respond to that?

MR. DIMENTO: I will, your Honor. First of all, your Honor, this case is not as if Section 1955 in the indictment had been miscited. That is at the very end when it says, "All in violation of Title 18, United States Code, Sections 1955 and 2." If that phrase had read in violation of

Sections 1954 or 638, whatever, I would have no complaint here, and I realize that I would have no standing. That is a miscitation that can be corrected. That is the type of case that has been cited by the Government's counsel.

THE COURT: All right. I would appreciate it if you would address yourself to what I think is right now the most serious issue, and that is the fact that this case has been sitting around for three years. Motions of every kind and description were brought over that period, innumerable hearings, six days of [11] trial, and finally at whatever it was, quarter of eleven yesterday, the question of the application of the statute is finally brought to the Court's attention.

MR. DIMENTO: Well, your Honor, that is because —

THE COURT: How can you allege prejudice at that point?

MR. DIMENTO: I don't think I have to allege prejudice. That is because I was acting as a technician, in taking matters as they arose. My Motion to Strike did not ripen until the Government brought to the attention of the Court Section 17 and asked that the Court take judicial notice and actually handed the Court a copy of the statute.

THE COURT: That was in the indictment, and at no time during the course of this trial did anybody object to the introduction of evidence on the subject of numbers. What do you have to say to that?

MR. DIMENTO: What I'm saying, your Honor, it did not become objectionable until the point in the trial which the Court was asked to take judicial notice and handed the statute. Only then would a lawyer who is acting according to procedure —

THE COURT: You mean to say if this thing had alleged — well, this thing did allege Section 17. [12] That didn't put you on notice as to what the theory of the Government's

case was and that didn't raise an obligation on your part to object at every stage?

MR. DIMENTO: Well, the last part first, did not raise an allegation on my part, because acting according to procedure, which I consider to be correct procedure, motion, the objection or the Motion to Strike did not ripen until such time as the Court was asked to take judicial notice of the statute.

If the Court had been asked at the beginning of the trial, I planned to raise it then. I expected, actually, that it be asked at the beginning of the trial, but it was not. It was not asked until the end of the trial.

THE COURT: I don't follow that. I don't think that's right at all.

MR. DIMENTO: I think what Section 17 states, of course, your Honor —

THE COURT: You let all of this stuff come in.

MR. DIMENTO: Pardon?

THE COURT: You let all of this stuff come in without saying a word. You sat there without objection to the numbers part of the evidence as it came in, is that right?

[13] MR. DIMENTO: To a large extent, your Honor, the numbers part of the evidence was intermingled with other evidence.

THE COURT: You certainly could object to parts of pieces of evidence.

MR. DIMENTO: If I called it to your attention, I'm sure you would have ruled upon it, but I didn't feel at that time that it was ripe, because we still didn't have Section 17 before us. Section 17, as a matter of evidence, is not as 1955 is, merely an appendage to the charge, it's a matter of evidence in the case, a matter of judicial notice.

THE COURT: It's a matter of judicial notice.

MR. DIMENTO: Which makes it a matter of notice.

THE COURT: Whether it's necessary that that be specifically drawn to my attention or not, I don't know.

MR. DIMENTO: And, actually, your Honor, if you want to know something else that happened, was that I didn't even look at the paraphernalia, the documentation, until at the end of the trial, and never realized how much — I know, it's my own fault.

THE COURT: A man saying, "This is an envelope with six day numbers in it" —

[14] MR. DIMENTO: Yes, I didn't look at the size of the bulk of it until the end of the trial.

THE COURT: That is your problem.

MR. DIMENTO: Yes. You asked how it happened.

THE COURT: I didn't really ask how it happened, I asked what is your view of the significance of it?

MR. DIMENTO: Okay. My view of the significance of it is I'm entitled to rely on procedures followed in the Courts. That is what lawyers are for. If I didn't follow procedures, my clients would try the case. That is why I'm here, because I try to follow rules of the Court.

THE COURT: I don't know of any rule that would have prevented you from raising the objection to the numbers evidence.

MR. DIMENTO: I agree, your Honor, that if I had, you might very well have acted upon it at that time. But no harm has been done to the Government by this, because we can ex[c]ise it now as easily as we could have before.

THE COURT: Well, no, we can't. It will be quite a job to ex[c]ise all of that stuff.

MR. DIMENTO: The job has been done. The [15] Government has given us a list of everything they agreed to this morning.

THE COURT: I see, all right.

MR. DIMENTO: So it's just a matter of physically separating out certain items.

THE COURT: What's the reference on judicial notice of State statutes, do you know, offhand?

MR. DIMENTO: I don't now offhand, your Honor, no.

THE COURT: Anything further?

MR. DIMENTO: Let me just consult my notes. Well, I would only repeat what you've already said. This is not surplusage, the citation, it's descriptive of an essential element of the crime. I agree with the Court that if the Government had chosen to allege that it was an illegal gambling business in violation of Massachusetts law, then it would have been incumbent upon me to seek particulars, and the Government would not be bound, as it is now, but having specified within the indictment the particular business in violation, as I submit, they are stuck with it; it's not a matter of prejudice because there is no prejudice.

The inconvenience is the same on both sides. The separation has already been made. The jury hasn't [16] even seen the exhibits, except from a distance, and there is just no difference now, whether you take it out now or you take it out during the trial.

MR. REDMOND: Could I just say one thing, your Honor?

THE COURT: Yes.

MR. REDMOND: I would just like to call to your Honor's attention, while I sat here all of last week, I was in a slightly different position from my brothers, here, and that is, as your Honor well knows, there wasn't one slip of paper that was originally offered against Arthur Plotkin, horse, number, sports, or anything. My objection was, on the first piece of evidence, documentary evidence, that was asked, as your Honor perhaps remembers, I was the one that stood up and said I wanted limitations, and there were

limitations on everything all the way through. I couldn't object if it wasn't being offered against me.

THE COURT: There was a numbers, purely numbers telephone call that you let come in without raising this particular objection.

MR. REDMOND: I know, but I had objected.

THE COURT: I don't fault you on raising every other objection that you could think of, you [17] did that. But nobody raised this point until yesterday morning.

MR. REDMOND: That goes back to what Mr. DiMento is saying. I'm talking now specifically about the documentary evidence, your Honor. There certainly was no obligation on me, your Honor.

THE COURT: The obligation on you came at the point where the telephone conversation came up which dealt only with numbers, and you didn't speak then, either. I appreciate what you say about the documents.

Does anybody else want to say anything?

MR. BOUDREAU: Could I just respond very briefly to Mr. DiMento's comments? He made the statement the Government is in no different position now. I submit, the Government is in an entirely different position, now. The case is, you know, totally disorganized and fragmented because the contention is raised at this point in time, when it could have been raised as an attack upon the indictment, pretrial, and that Section 17 factually — the Government set forth it was contending the Defendants had participated in the operation of an illegal numbers pool and cited the specific section as Section 17. The Defendants [18] could have made an attack upon the indictment at that time. They also could have objected to the introduction of evidence, as it was coming in. Now, after they've waited until the case is concluded, now they want to say it's not a technical error that could have been corrected at some point in time.

The factual allegations have been there all the time, and the Government has not deviated in any respect, whatsoever, from the allegations contained in the indictment in this case.

With respect to the evidence that's to be excised, your Honor, there has been agreement with respect to considerable portions, but not all of the evidence. There are some contested items of evidence, some which the Government feels is horse or sports operations. Some of the evidence is mixed, your Honor.

THE COURT: Well, mixed evidence will go in.

MR. DIMENTO: We have no objection to that.

THE COURT: I think the rule is loaded. It isn't as I read it and have understood it over the years. The rule of pleading is not a bald one, that is to say, it's loaded against the Government. The sensitivity which the Courts have for the rights of defendants has brought this about, and with some [19] reluctance, with considerable reluctance, I'm going to deny the Government's motion and the matter will stay just as it was with some reluctance in view of the posture of the case at that time in what I consider to be the failure of the Government to make a timely objection, I'm still going to deny the motion because the question of identification of the crime charged is such a basic one in the criminal law that we'll go forward.

MR. MCDOWELL: Your Honor, while I don't intend to argue, I would like to offer the Motion on Reconsideration on Sanabria.

THE COURT: Well, it has no bearing now.

MR. MCDOWELL: Should the Solicitor General authorize an appeal on the granting of the Motion to Acquit, it's incumbent upon the Government to make a motion at a time when you will have a chance to act on it to preserve the record.

THE COURT: I will not hear argument on it, but I will tell you what my view is on it.

If the other motion had been granted, I think, probably, the Motion to Reconsider the Acquittal of Sanabria would be allowed under these new decisions: Wilson, which is in 420 US 322; Jenkins, 420 US 358; and Serfass at 420 US 377, all decided the last term. All of those seem to say if a judgment of acquittal [20] or judgment of dismissal is entered on legal grounds as opposed to containing or importing a finding of fact and the reversal of that decision would not require a new trial, then it may be reversed.

Now, the other cases, the case that Mr. DiMento was talking about last night involving the U. S. Attorney out of this District, went to the Supreme Court and the name of it is Foo Fong versus the United States. I think I have that right.

MR. MCDOWELL: Fong Foo, your Honor.

THE COURT: Fong Foo, all right. In Fong Foo the jury had been discharged, and it would have been necessary to draw a new jury and start a new trial, and in Jenkins they specifically distinguished Fong Foo from the Wilson-Jenkins-Serfass group, so it would have been my ruling — I'm getting this on the record so you can do what you want to do with it.

MR. MCDOWELL: I appreciate that, your Honor.

THE COURT: It would have been my ruling if I allowed the Motion to Amend, I probably would have allowed the Motion to Reconsider the Judgment of Acquittal on Sanabria under these new rules. I really consider these group of cases a departure from the prior rule, but there they are. These are the fellows that call the tune.

[21] I'm not going to hear argument on it because I'm just filling out the record for Mr. McDowell.

. . . . . .

[32] THE COURT: All right. We will leave them in if it's an open question.

One of the bases of this is that this matter, having come at this time in the trial, the burden is on the Defendant to show that these things should be stricken. If there is a mixed bag, it stays in. I do not buy the argument submitted by Mr. DiMento on the delay of raising this issue.

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[51] THE COURT: Ladies and gentlemen of the jury, good morning. We have now come to the point of argument on a case, as I said yesterday, that is somewhat different than it was when it started off. This is because of a ruling I have made concerning the reference in the indictment to Section 17 of Chapter 271 of the Massachusetts General Laws, which I have ruled to take out of the case, the involvement of these Defendants in a business, a gambling business having to do with the numbers pool. The bulk of the evidence, physical evidence, that is, the documents having to do with the numbers, those have been withdrawn from the exhibits. There will be some matters having to do with numbers that are still in [52] there. The significance of which, I will tell you about in the course of the instructions.

The other thing that has happened is that the case against Thomas Sanabria is no longer before you because there wasn't any other kind of evidence introduced against him except evidence having to do with the numbers pool. So that Defendant is no longer a part of this case.

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